UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

CRIS J. MARKEY,

Plaintiff,

v.

BANK OF AMERICA, N.A; RECONTRUST COMPANY N.A.; FEDERAL NATIONAL MORTGAGE ASSOCIATION; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.; NEVADA LEGAL NEWS, LLC; and DOES 1 through 100, inclusive,

Defendants.

Case No. 2:12-cv-00027-LDG-GWF

ORDER

The plaintiff, Cris J. Markey, initially brought this suit in state court, alleging claims of wrongful foreclosure and civil conspiracy against the defendants, Bank of America, N.A., ReconTrust Company, N.A., Federal National Mortgage Association, Mortgage Electronic Registration Systems, Inc., and Nevada Legal News, LLC. The Court dismissed (#22) that original complaint without prejudice, providing Markey an opportunity to amend his complaint to cure the defects. Markey filed an Amended Complaint (#24) that, in large part, merely added nine additional claims while eliminating Nevada Legal News as a defendant. In the Amended Complaint, Markey asserts claims for (1) violation of the Home Ownership Equity Protection Act (HOEPA), 15 U.S.C. §1639 *et seq*., (2) violation of the

Real Estate Settlement Procedures Act (RESPA), 12 U.S.C. §2601 *et seq.,* (3) violation of the Truth-in-Lending Act (TILA), 15 U.S.C. §1601 *et seq.,* (4) violation of the Fair Credit Reporting Act (FCRA), 15 U.S.C. §1681(o), (5) fraudulent misrepresentation, (6) breach of fiduciary duty, (7) unjust enrichment, (8) civil conspiracy, (9) civil rico, (10) usury and fraud, (11) wrongful foreclosure, (12) and quiet title.

The defendants again move to dismiss (#25), which Markey opposes (#30). The Court will grant the motion with prejudice as Markey has previously had an opportunity to amend his pleadings but has again failed to allege sufficient facts to state a claim.

Statement of Facts

In early August of 2005, Markey entered into a loan agreement with 1st National Lending Services ("1st National") to purchase a home, located in the northwesterly portion of Las Vegas, NV. The agreement was pursuant to the execution of a Promissory Note and Deed of Trust. 1st National was listed as lender while Mortgage Electronic Registration Systems, Inc. (MERS) was listed as the nominee for the beneficiary and as the beneficiary, while ReconTrust Company, N.A. ("ReconTrust") was listed as the original Trustee.

Shortly thereafter, through a series of transactions, the mortgage servicing rights were transferred to Countrywide Home Loans, Inc. ("Countrywide"). Later, those rights were again transferred to BAC Home Loans Servicing L.P. (at the time a wholly-owned subsidiary of Bank of America) after Bank of America acquired Countrywide. MERS assigned the Deed of Trust to Bank of America on July 1, 2011.

Markey defaulted on his loan on June 1, 2008. In July of 2011, ReconTrust recorded a Notice of Default/Election to Sell Under a Deed of Trust. As the property was not owner-occupied, Markey was not eligible to participate in Nevada's Foreclosure Mediation Program. *See* NRS §107.086. The Nevada Foreclosure Mediation Program

issued a certificate permitting foreclosure on October 11, 2011. In November of 2011, ReconTrust recorded a Notice of Trustee's Sale stating ReconTrust's intent to foreclose the property on December 20, 2011 at 10:00 AM.

Motion to Dismiss

The court may dismiss a plaintiff's complaint for "failure to state a claim upon which relief can be granted." FED. R. CIV. P. 12(b)(6). A properly pled complaint must provide "a short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a)(2); *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 555 (2007). While Rule 8 does not require detailed factual allegations, it demands "more than labels and conclusions" or a "formulaic recitation of the elements of a cause of action." *Ashcroft v. Iqbal,* 129 S. Ct. 1937, 1949 (2009) (citing *Papasan v. Allain,* 478 U.S. 265, 286 (1986)). "Factual allegations must be enough to rise above the speculative level." *Twombly,* 550 U.S. at 555. In deciding whether the factual allegations state a claim, the court accepts those allegations as true, as "Rule 12(b)(6) does not countenance . . . dismissals based on a judge's disbelief of a complaint's factual allegations." *Neitzke v. Williams,* 490 U.S. 319, 327 (1989). Further, the court "construe[s] the pleadings in the light most favorable to the nonmoving party." *Outdoor Media Group, Inc. v. City of Beaumont,* 506 F.3d 895, 900 (9th Cir. 2007). When the legal sufficiency of a complaint's allegations is tested by a motion under Rule 12(b)(6), generally "review is limited to the complaint." *Lee v. City of Los Angeles,* 250 F.3d 668, 688 (9th Cir. 2001), (citing *Cervantes v. City of San Diego,* 5 F.3d 1273, 1274 (9th Cir.1993)). Nevertheless, the "question is whether the allegations, *together with the attachments to the complaint*, set forth a viable theory." *Rick-Mik Enterprises, Inc. v. Equilon Enterprises, Inc.,* 532 F.3d 963, 967 (9th Cir. 2008) (emphasis added). Yet, to survive a motion to dismiss, a complaint must contain sufficient factual matter to "state a

claim to relief that is plausible on its face." *Iqbal,* 129 S. Ct. at 1949 (internal citation omitted).

In *Iqbal*, the Supreme Court clarified the two-step approach district courts are to apply when considering motions to dismiss. First, the Court accepts as true all well-pled factual allegations in the complaint; however, legal conclusions are not entitled to the assumption of truth. *Id.* at 1950. Mere recitals of the elements of a cause of action, supported only by conclusory statements, do not suffice. *Id.* at 1949. Second, the Court considers whether the factual allegations in the complaint allege a plausible claim for relief. *Id.* at 1950. A claim is facially plausible when the plaintiff's complaint alleges facts that allow the court to draw a reasonable inference that the defendant is liable for the alleged misconduct. *Id.* at 1949. Where the complaint does not permit the court to infer more than the mere possibility of misconduct, the complaint has "alleged-but not shown-that the pleader is entitled to relief." *Id.* (internal quotation marks omitted). When the claims in a complaint have not crossed the line from conceivable to plausible, plaintiff's complaint must be dismissed. *Twombly,* 550 U.S. at 570. Having said that, the court recognizes that pro se complaints are held to less stringent standards than those drafted by lawyers, *Haines v. Kerner,* 404 U.S. 519 (1972). *Iqbal* incorporated the pleading standard of *Twombly* but *"Twombly* did not alter the court's treatment of pro se filings; accordingly, [the court will] continue to construe pro se filings liberally when evaluating them under *Iqbal*." *Hebbe v. Pliler,* 627 F.3d 338, 342 (9th Cir. 2010). Regardless, sweeping conclusory allegations do not suffice. *Leer v. Murphy,* 844 F.2d 628, 634 (9th Cir. 1988).

The Common Law Claims

As Markey has again alleged claims for wrongful foreclosure, civil conspiracy, and quiet title, the Court will begin by considering whether he has, in his amended complaint, alleged facts sufficient to permit these claims to go forward.

Wrongful Foreclosure

Markey again claims wrongful foreclosure. "An action for the tort of wrongful foreclosure will lay if the trustor or mortgagor can establish that at the time the power of sale was exercised or the foreclosure occurred, no breach of condition or failure of performance existed on the mortgagor's or trustor's part which would have authorized the foreclosure or exercise of the power of sale." *Collins v. Union Federal Sav. & Loan Ass'n,* 662 P.2d 610, 623 (Nev. 1983). Markey's complaint does not allege that he was not in default. In fact, the only inference that may be drawn from the complaint is that Markey was in default particularly in light of the "Notice of Default" attached to his complaint. Markey offers no assertions regarding the failure to make any payments since 2008. Specifically, Markey does not aver that he was current on his mortgage and therefore not in default.

Furthermore, Markey's renewed reliance that his loan was paid off by "cross-collateralization, over collateralization, credit default swaps, insurance guarantees, and government bailout monies" fails for the same reasons as originally set forth by this court. As with his original complaint, Markey has failed to allege facts requisite to maintaining a claim for wrongful foreclosure. Accordingly, the Court will dismiss this claim with prejudice.

Civil Conspiracy

Civil conspiracy requires the existence of an underlying tort. *Flowers v. Carville,* 266 F.Supp.2d 1245, 1249 (2003), *see also* C.J.S. CONSPIRACY § 8 (2006). In addition to attaching to an underlying tort, a proper claim for civil conspiracy must establish the following elements: (1) defendants acted in concert; (2) defendants intended to accomplish an unlawful objective for the purpose of harming plaintiff; and (3) plaintiff sustained damage resulting from the defendants' acts. *See Consol. Generator-Nevada, Inc. v. Cummins Engine Co., Inc.,* 114 Nev. 1304, 1311, 971 P.2d 1251, 1256 (Nev. 1999);

Jordan v. Nevada, 121 Nev. 44, 74-75, 110 P.3d 30, 51 (Nev. 2005) (conspiracy requires a "combination of two or more persons who, by some concerted action, intend to accomplish an unlawful objective for the purpose of harming another."), abrogated on other grounds by *Buzz Stew, LLC v. City of North Las Vegas,* 181 P.3d 670 (Nev. 2008). At the heart of a conspiracy claim is the "agreement between the tortfeasors, whether explicit or tacit." *In re Koonce,* 262 B.R. 850, 861 (Bankr. D. Nev. 2001). In order to plead an adequate claim of conspiracy to commit a tort, the Plaintiff cannot merely state that a conspiracy exists. *Iqbal,* 129 S. Ct. at 1950 ("While legal conclusions can provide the complaint's framework, they must be supported by factual allegations."). Moreover, in civil conspiracy actions, the complaint must allege facts such as a "specific time, place, or person involved in the alleged conspiracies to give a defendant seeking to respond to allegations of a conspiracy an idea of where to begin." *Kendall v. Visa U.S.A., Inc.,* 518 F.3d 1042, 1047 (9th Cir. 2008).

Markey has not alleged sufficient facts of any illegal agreement among the defendants. "[A] conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality . . . . [W]ithout some further factual enhancement it stops short of the line between possibility and plausibility of entitlement to relief." *Twombly,* 550 U.S. at 557 (internal quotation omitted); see also *Kendall,* 518 F.3d at 1047-48 (affirming dismissal of conspiracy claim because the plaintiffs "pleaded only ultimate facts, such as conspiracy, and legal conclusions . . . [but] failed to plead the necessary evidentiary facts to support those conclusions"). Furthermore, Markey's civil conspiracy claim is lacking because his failure to state an actionable claim for wrongful foreclosure removes the underlying tort that must be attached to a proper claim for civil conspiracy. As with his original complaint, Markey's renewed claim of civil conspiracy claim is without merit and will be dismissed with prejudice.

Quiet Title

"A quiet title action requests a judicial determination of all adverse claims to disputed property." 65 Am. Jur. 2d. *Quieting Title and Determination of Adverse Claims* § 1. In Nevada "[a]n action may be brought by any person against another who claims an estate or interest in real property, adverse to him, for the purpose of determining such adverse claim." NEV.REV.STAT § 40.010. The burden of proof in a quiet title action "rests with the plaintiff to prove good title in himself." *Breliant v. Preferred Equities Corp.,* 112 Nev. 663, 669, 918 P.2d 314, 318 (Nev. 1996).

Markey has not alleged that he has good title himself. He states that his loan for the property in this case was secured by a deed of trust but nowhere does he allege that he paid off the loan. He provides no legal or factual justification for his quiet title claim other than the conclusory allegation that the foreclosure was wrongful, invalid or voidable. The Court therefore finds that his quiet title claim does not rise above a speculative level and is therefore subject to dismissal.

Fraud

Claims sounding in fraud must plead "with particularity the circumstances constituting fraud." Fed. R. Civ. Pro. 9(b). Markey's allegations of fraud do not even begin to approach this heightened standard. Dismissal of this claim is appropriate.

Breach of Fiduciary Duty

A claim for breach of fiduciary duty requires, at a minimum, an allegation of sufficient facts to permit an inference of a special or fiduciary relationship between the plaintiff and the defendant. In the present matter, however, the allegations permit only an inference that the plaintiff was not owed a fiduciary duty by any of the defendants. Dismissal of this claim is appropriate.

Unjust Enrichment

"An action based on a theory of unjust enrichment is not available when there is an express, written contract, because no agreement can be implied when there is an express agreement." *Leasepartners Corp. v. Robert L. Brooks Trust*, 942 P.2d 182, 187 (Nev. 1997). Markey acknowledges he executed an express contract in connection with the deed of trust and his home loan. Further, he fails to allege any facts that would support an inference that his monthly payments were for an amount not contemplated by the contract. Accordingly, dismissal of this claim is also appropriate.

Civil Rico

The Ninth Circuit has recognized that the heightened pleading standards applicable to fraud claims under Rule 9(b) apply to a RICO alleging predicate acts of fraud. *See Lancaster Cmty. Hosp. v. Antelope Valley Hosp. Dist.,* 940 F.2d 397, 405 (9th Cir. 1991). Markey's Amended Complaint fails to state the time, place, and specific manner of the asserted false statements or omissions. Dismissal of this claim is appropriate.

Usury

Markey does not dispute that, in Nevada, parties may agree to any rate of interest and any fees. *See* NRS §99.50. Accordingly, dismissal of his usury claim is appropriate.

Federal Statutory Claims

Each of Markey's HOEPA, RESPA, and TILA claims is time-barred to the extent they derive from the closing of Markey's loan in August 2005. He filed his original complaint in December 2011, long after the expiration of the statute of limitations for any of the federal statutory claims. Accordingly, dismissal of these claims is appropriate.

To the extent that Markey's RESPA claim can be liberally construed as asserting a claim that rests upon an allegation that he sent a Qualified Written Request to Bank of America, the claim fails as a matter of law. The letter Markey alleges is a Qualified Written Request (and which he attached to his complaint as Exhibit 1) does not qualify as a Qualified Written Request. Accordingly, dismissal of any such claim is appropriate.

Markey's FCRA claim fails because his complaint fails to allege, (and he does not dispute that he has not alleged) facts suggesting that the furnisher of credit information received notice of disputed information from a credit reporting agency and failed to comply with its duties.

Leave to Amend

If the Court grants a motion to dismiss a complaint, it must then decide whether to grant leave to amend. The Court should "freely give" leave to amend when there is no "undue delay, bad faith[,] dilatory motive on the part of the movant ... undue prejudice to the opposing party by virtue of ... the amendment, [or] futility of the amendment...." Fed.R.Civ.P. 15(a); *Foman v. Davis,* 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962). Generally, leave to amend is only denied when it is clear that the deficiencies of the complaint cannot be cured by amendment. See *DeSoto v. Yellow Freight Sys., Inc.,* 957 F.2d 655, 658 (9th Cir.1992).

The Court previously expressed its doubts that the defects in Markey's original complaint could be cured by amendment. However, in consideration of the generous standards of the Federal Rules, the Court dismissed the original complaint without prejudice to provide Markey an opportunity to cure those defects. Having reviewed the amended complaint, Markey has removed all doubt and established that he will not be able to allege facts to support his claims.

Accordingly,

THE COURT **ORDERS** that Defendants' Motion to Dismiss Amended Complaint (#25) is GRANTED with prejudice.

DATED this 27 day of September, 2013.

Lloyd D. George
United States District Judge